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IN THE

Supreme Court of the United States

No. 490

AUGUSTA M. TURNER,
Petitioner,

v.

CARL A. LUER, WILLIAM J. LUER, HERMAN F. LUER,
Respondents,

ALTON BANKING AND TRUST COMPANY, a Corporation, Executor of the Last Will and Testament of AUGUST LUER, Deceased,
Intervening-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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INDEX.

Page

Jurisdiction 2

Decision of the Circuit Court of Appeals, Seventh Circuit 2

Statement of the Matter Involved 2

Question 8

1) Should the oft-challenged and overruled doctrine of Swift v. Tyson be re-established? 8

2) Are the federal courts authorized to supply their own unwritten "general law" of trust and disregard the applicable local law? 8

3) Are the federal courts free to disregard the rule of the Illinois common law in a matter concerning the presumption that a voluntary trust is irrevocable unless the power to revoke is specifically retained? 8

Reasons Relied Upon for Allowance of Writ..... 8

I. The decision of the Circuit Court herein establishes an unwritten "general rule" of the law of trusts contra to the common law and applicable local law 8, 9

II. The decision resurrects the doctrine of Swift v. Tyson which was overruled in Erie R. Co. v. Tompkins 8, 10

III. If allowed to stand, the decision will become the basis for grave discrimination by non-citizens against citizens of a particular state and thus create uncertainty and render impossible equal protection of the law 8, 10

IV. An opportunity is created to defeat the application of the Federal Gift Tax Statutes..... 9, 11

V. The decision conflicts with decisions of other federal circuit courts on the same matter..... 9, 11

VI. The decision of the Seventh Circuit Court herein conflicts with applicable local law..... 9, 12

Page

(1) The decision does not follow the presumption that a voluntary trust is irrevocable unless by specific declaration a power to revoke is retained 9

(2) The decision improperly holds petitioner estopped to show existence of a valid trust. 9

Conclusion 13

Brief in Support of Petition 15

No consent from beneficiaries for destruction of trust 15

The decision resurrects the repudiation doctrine of Swift v. Tyson. It will establish again a basis for discrimination by non-citizens against citizens, create uncertainty and render impossible equal protection of the law 17

The decision of the Circuit Court thus creates a transcendental body of the law of trusts outside of any particular state but obligatory within the Seventh Circuit 18

Circuit Court ignores Erie R. Co. v. Tompkins. Resurrects the repudiated doctrine of Swift v. Tyson 19

Estoppel and competency of petitioner to testify... 21

Conclusion 25

CASES CITED.

Alameda County v. U. S. (1941) C. C. A 9th, 124 F. 2d 611 12

Auer c. Wm. Myer Co., 322 Ill. App. 344, 54 N. E. 2d 394 ..... 13, 24

Anderson v. Irwin, 101 Ill. 411 24

Botzum v. Havana National Bank (1937) 367 Ill. 539, 12 N. E. 2d 203, 131 A. L. R. 469 ..... 12, 16

Black and White Taxicab and Transportation Co. v. Brown and Yellow Transfer Co., 276 U. S. 518, 48 S. Ct. 404 18

Page

Board of Commissioners v. U. S., 308 U. S. 343, 60 S. Ct. 285 21
Crimp v. First Union Trust and Savings Bank, 185 N. E. 179, 352 Ill. 93 24
Chadwick v. Clapp, 69 Ill. 119 24
Continental Commercial Saving Bank v. Lantry Contracting Co., 189 Ill. App. 296 24
Dobroth v. Jensen, 348 Ill. 167 . . . . . 12, 18
De Mets, Inc. v. Insull, 122 Fed. 2d 755 24
Drain v. La Grange State Bank, 303 Ill. 330, 135 N. E. 780 24
Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 8, 10, 13, 18, 19, 20, 25
Harding v. Harding, 186 N. E. 152, 352 Ill. 417 24
Harris Trust and Savings Bank v. Morse, 238 Ill. 232, 9, 12, 18
Hubbard v. Buddemeir, 328 Ill. 76 . . . . . 9, 12, 18
Hudson v. Hudson, 287 Ill. 286, 122 N. E. 638 . . . . . 13, 24
Hughes v. Commissioner of Internal Revenue (1939) C. C. A. 9th, 104 F. 2d 144 11
Kraus v. Greenberg (1943) C. C. A. 3rd, 137 F. 2d. 569. 11
Lipscomb v. Allen, 298 Ill. 537, 132 N. E. 206 24
May v. Marx (1939) 300 Ill. App. 144, 20 N. E. 2d 821. . 16
Nofftz v. Nofftz, 290 Ill. 36 . . . . . 13, 19
Richlin v. New York Life Ins. Co., 304 U. S. 202, 58 S. Ct. 860, 131 A. L. R. 457 21
Swift v. Tyson (1842) 16 Pet. 1, 10 L. ed. 865, 8, 10, 13, 18, 19, 20, 25
R. H. Stearns v. U. S., 291 U. S. —, 54 S. Ct. 329 25
Sutliff v. Aydelott (1940), 373 Ill. 633, 27 N. E. 2d 529, 131 A. L. R. 457 16
Taylo v. Riggs, Pet. 591, 6 L. ed. 140 21
United States v. Dunn, 286 U. S. 121 24
Whitlock v. McClusky, 91 Ill. 582 24
Williams v. Evans, 154 Ill. 98 . . . . . 9, 12, 18, 19

TEXTBOOKS.

131 A. L. R. 457, etc. 11, 12, 16
Frankfurter, Distribution of Judicial Power between Federal and State Courts (1928) 13 Corn. L. Q. 499-452, 530 10

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Intervening-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

Augusta M. Turner, a citizen of the United States of America, prays that a writ of certiorari issue to bring before this Court for review a judgment rendered by the United States Circuit Court of Appeals for the Seventh Circuit affirming a judgment of the District Court of the United States for the Southern District of Illinois, Southern Division, dismissing the petitioner's suit.

JURISDICTION.

The judgment of the United States Circuit Court of Appeals for the Seventh Circuit affirming the judgment of the District Court dismissing plaintiff's suit was entered on April 24, 1945. (R. 256)

Petition for rehearing was seasonably filed and was denied June 9, 1945 (R. 257) and time within which to file this petition was extended to October 8, 1945, by order of Mr. Justice Black. (R. 258)

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended. (Title 28, U. S. C. A. 347)

DECISION OF THE CIRCUIT COURT OF APPEALS.

The decision of the United States Circuit Court of Appeals for the Seventh Circuit, affirming the District Court, will be found in the record on pages 251 to 256, inclusive, and is reported in 149 F. 2d 51.

The Opinion of the District Court will be found in the record on pages 229 to 233.

STATEMENT OF THE MATTER INVOLVED.

This action was commenced by suit in the District Court of the United States for Southern District of Illinois, Southern Division, to establish a trust and require the three individual respondents, as trustees, to account to petitioner for her one-fifth share therein. (R. 2, 88)

August Luer, father of the petitioner and of the three individual respondents, created a trust on February 17, 1930, for the life benefit of himself and wife, with remainders to his five children and their descendents. (R. 104) The children, all adults, consisted of the three sons (the individual respondents) and two daughters, one of whom is the petitioner. He had nine grandchildren at that time. (R. 195) At a family meeting called by August Luer, the

instrument creating the trust was read by the trustees and beneficiaries, after which it was signed in duplicate by August Luer and by the three sons as trustees. (R. 102 to 106, 145, 195, 201, 208)

Certain property, corporate stocks and a promissory note were assigned and transferred to the trustees by the settlor, as a part of the trust corpus. (R. 157, 158, 161 to 177)

In December, 1932, or January, 1933, August Luer destroyed his signed copy of the trust instrument, procured from one of the trustees the other signed copy of the trust instrument, which he destroyed.[1] In January, 1933, the corporate stocks and promissory note were reconveyed by the trustees to August Luer. (R. 178)

So far as it appears in evidence August Luer left no records to show the terms of the trust or to show whether any of the beneficiaries consented to the destruction of the trust instrument or to a revocation.

August Luer died September 22, 1942, his wife having predeceased him, and one daughter, Helen Luer Petersen, died November 24, 1941, leaving a surviving daughter. (R. 98, 212)

The attorney who drew the trust instrument is dead. (R. 121)

The respondents' pleadings contain no allegation as to why they permitted the settlor, August Luer, to destroy his

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[1] William J. Luer, a trustee and respondent, testified that in connection with the renewal of a promissory note held by a bank, the effect of the August Luer trust had been discussed and that August Luer came to his office in December, 1932.

(R. 185)—Direct examination of William J. Luer:

"Q. Did your father say anything to you about a trust instrument on that particular occasion?

A. He said he was going to destroy it on account of that particular note—it was a note we boys were supposed to sign."

He testified that August Luer destroyed the trust instrument and also the trustees' copy which he gave to August Luer at his request. (R. 186, 187)

copy of the trust instrument, nor the reason they participated with him in the destruction of their copy other than in connection with the bank note stated in foregoing footnote. Likewise, the evidence adduced at the hearing in the District Court contains nothing tending to reveal why both of the signed trust instruments were destroyed by the settlor, when, if they had contained a reservation of revocation, the settlor's written revocation would have been sufficient, and all the documents could have been preserved, including the trust instruments.

At the hearing in District Court, the petitioner, her husband, and the secretary of the attorney who drew the trust instrument, all testified that the trust contained a clause stating that the trust was *irrevocable.* (R. 105, 124, 133)

The petitioner introduced as an exhibit a trust instrument containing an irrevocable provision in the drafting of which the attorney for August Luer had used as a model for the irrevocable provision his office file copy of the Luer trust prior to its destruction. (R. 143, 155)

The three trustees (respondents) testified that they *"did not remember", "could not recall"*, and *"did not think"* the Luer trust instrument contained a clause stating the trust was irrevocable. (R. 194, 197, 203, 205, 208, 209)

There is no evidence that the trust contained any declaration that it was revocable.

The District Court and Court of Appeals held that the *petitioner* failed to establish that the trust was irrevocable. (R. 253)

The Court of Appeals disregarded the established rule of Illinois law that a voluntary trust is presumed to be irrevocable. The Court of Appeals held:

> (R. 253) "Here was a somewhat difficult burden in view of the destruction of all copies of the trust instrument."

The Circuit Court disregarded the Illinois rule of presumption against the spoliators and overlooked the fact

that it was the settlor and a trustee-respondent who destroyed the trust instrument and placed the burden, if any there be, on the petitioner.

The Court of Appeals stated further:

> (R. 253) "It is rather hard to believe that one so reliable and upstanding as Mr. Luer would destroy a trust agreement by tearing it up, were it irrevocable."

Now there is nothing whatsoever in this record as to how upstanding or reliable was Mr. Luer (the Trustor). We may note further that if an upright and upstanding man had revoked and destroyed his solemnly executed trust instrument, he would be expected to leave available some plain memorial of the justification for his action.

This holding on the part of the Court of Appeals is given by the Court as adding to the burden already assigned (by the Court) to the petitioner of proving that the trust instrument was irrevocable in terms.

To what extent her burden was thereby increased, or what weight was given by the Court to this (assumed) character of the Trustor, does not appear, and is problematical. Any weight given to it was plainly erroneous.

The Court should have followed the recognized principle of the law of Illinois as to a despoiler of evidence and held that, it must be presumed that the trust was irrevocable, otherwise it would have been retained as a memorial and revoked by the settlor's written designation.

The Circuit Court affirmed the District Court's ruling that the petitioner had

> (R. 231) "failed to establish by the evidence in this case that such action on the part of August Luer was without authority and void, * * *"

The Circuit Court affirmed the District Court invoking against the petitioner the rule of "estoppel" to assert a valid trust. (R. 233) We assume the Court relied upon Finding of Fact numbered VI, VII and VIII (R. 231, 232)

because the petitioner had attended two corporate meetings with her father in which he appeared as a stockholder, and because she had not protested the sale by the executors of her father's estate and the purchase by one of the respondents of certain personal property. In their answer to petitioner's suit, respondents admit this is the same property which was at one time held by them as part of the trust property. (R. 11, 66)

These findings of fact do not support the claim and finding of estoppel.

With respect to the finding in VI that petitioner had knowledge of the destruction of the trust agreement during the period from and after its destruction up to a short time prior to this suit, that finding is without any supporting evidence.

With respect to the finding that, during said period, petitioner knew of the return of the trust assets to the Trustor, that finding is without any supporting evidence.

With respect to the other findings in VI (R. 231) the Luer Building Company had outstanding at least 495 shares of stock, prior to the delivery of the trust assets to the trustees. Only 95 of said shares were conveyed in trust to the trustees. (R. 230)

On May 17, 1931, August Luer held the title to 100 shares. (R. 24)

There is absolutely nothing in the minutes of the proceedings of the Luer Building Company justifying the finding in VI that petitioner, by any waiver agreements, or by her attendance at any stockholders' meetings, acquired notice or knowledge of the revocation of the trust instrument or of the resumption of control or ownership of the stock of the Luer Building Co. by the Trustor; and such finding by the District Court and its affirmance by the Circuit Court of Appeals are unjustified by this or any other evidence in the record.

Finally, in support of lame and unsupported conclusions, the Circuit Court of Appeals relies on a statement attrib-

uted to petitioner's husband (searching for some evidence) that "the trust has been cancelled out a long time ago".

The witness actually testified (R. 215) that he did not mention the August Luer trust to petitioner's husband; further, that he did not know what petitioner's husband was talking about.

The petitioner's husband testified (R. 219) that he did not mention a trust in his conversation.

There is no showing or explanation as to when petitioner's husband had ascertained that fact. Non constat, but that it was a recent discovery by him of long past facts. To fasten this statement even if made as an estoppel upon his wife, this petitioner, is utterly wrong and unjustified.

The intervening respondents, Alton Banking and Trust Company, as Executors of the will of August Luer, objected to any testimony by petitioner concerning contracts, conversations or dealings with August Luer, now deceased. (R. 98)

August Luer and the three trustees were residents of Alton, Illinois, the trust instrument was executed there, and the situs of the trust property also was Illinois. (R. 88)

The petitioner is a citizen of the United States of America and a resident and citizen of the State of Missouri. (R. 88)

The Circuit Court of Appeals states the issues:

> (R. 252) "Plaintiff's suit is predicated on the theory that the 1930 trust created by her father was irrevocable. If irrevocable, plaintiff argues, it still is in force, and the corpus should be divided as provided in the trust, and not included in August Luer's estate."

The Opinion of the Circuit Court contains neither citations, references to appellant's authorities nor legal reasoning or explanation for disregarding Illinois law or the genesis of the announced unwritten "general law". (R. 229) The Opinion of the District Court likewise is deficient. (R. 251)

229

QUESTIONS.

1) **Should the Oft-Challenged and Overruled Doctrine of Swift v. Tyson [2] Be Re-established?**

2) **Are the Federal Courts Authorized to Supply Their Own Unwritten "General Law" of Trust and Disregard the Applicable Local Law?**

3) **Are the Federal Courts Free to Disregard the Rule of the Illinois Common Law in a Matter Concerning the Presumption That a Voluntary Trust Is Irrevocable Unless the Power to Revoke Is Specifically Retained?**

The Circuit Court in the instant case having held the burden was upon the petitioner to prove the trust irrevocable has thus held the trust will not be presumed to be irrevocable—this is *contra* to the Illinois law of trusts.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

I.

The decision of the Circuit Court herein establishes an unwritten "general rule" of the law of trusts *contra* to the common law and applicable local law.

II.

The decision resurrects the doctrine of *Swift* v. *Tyson* which was overruled in *Erie R. Co.* v. *Tompkins.*

III.

If allowed to stand, the decision will become the basis for grave discrimination by non-citizens against citizens

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[2] 1842—16 Pet. 1, 10 L. Ed. 865.
Overruled 1938—*Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817.

of a particular state and thus create uncertainty and render impossible equal protection of the law.

IV.

An opportunity is created to defeat the application of the Federal Gift Tax Statutes.

V.

The decision conflicts with decisions of other federal circuit courts on the same matter.

VI.

The decision of the Seventh Circuit Court herein conflicts with applicable local law.

(1) The decision does not follow the presumption that a voluntary trust is irrevocable unless by specific declaration a power to revoke is retained.

(2) The decision improperly holds petitioner estopped to show existence of a valid trust.

REASON I.

Decision Establishes an Unwritten "General Law" Contra to Local Law.

a) The common law and local law of Illinois establish a presumption that a voluntary trust is *irrevocable* unless a specific declaration makes it revocable.
Harris Trust and Savings Bank v. *Morse,* 238 Ill. 232;
Williams v. *Evans,* 154 Ill. 98;
Hubbard v. *Buddemeir,* 328 Ill. 76; 131 A. L. R. 457, etc.

b) This decision herein establishes a *contra* doctrine, namely, that a trust is *revocable* unless it is definitely established by its terms to be irrevocable.

The far-reaching application of this strange doctrine is apparent since herein the petitioner seeks to establish against the trustees a valid trust, when all copies of the instrument have been destroyed by the settlor with the co-operation of the trustees and the Circuit Court by its decision holds the local law can be disregarded and a "general law" can be followed.

REASONS II, III.

The Decision Resurrects the Repudiation Doctrine of Swift v. Tyson.

It Will Establish Again a Basis for Discrimination by Non-Citizens Against Citizens, Create Uncertainty and Render Impossible Equal Protection of the Law.

By its decision in *Erie R. Co.* v. *Tompkins, supra,* this Court overruled the doctrine of *Swift* v. *Tyson, supra,* stating at page 823:

> "Swift *v.* Tyson introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law."

This doctrine of *Swift* v. *Tyson, supra,* was overruled only after prominent advocates of the law by diligent research had established its lack of constitutionality and its serious discrimination had been realized.[3]

This decision until overruled will remain the rule in the Seventh Circuit and establishes a presumption that a voluntary trust is revocable and that the burden is upon the

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[3] Frankfurter, Distribution of Judicial Power between Federal and State Courts (1928), 13 Corn. L. Q. 499-524, 530; *Erie R. Co.* v. *Tompkins*—Footnotes 58 S. Ct., pages 818 to 822 incl.

cestui que trust to prove that a voluntary trust is not revocable but by its terms was made irrevocable, thus establishing a "general rule" of law *contra* to the applicable state law and denies to the non-citizen suing in federal courts equal protection of the law with citizens.

REASON IV.

Decision Creates Opportunity to Defeat Federal Revenues.

In its present form, the decision establishes that any trust can be revoked by destruction of the instrument itself, and that a trust will be presumed to be revocable unless it can be proven that it was irrevocable by its terms.

Thus, the stamp of legality is placed upon an act by the settlor who, in co-operation with trustees, destroys a trust instrument, thereby permitting its termination and return of the property where, otherwise, the property would be the basis of a gift taxable as such by the Federal Gift Tax Statutes.

REASON V.

The Decision Conflicts With Decisions of Other Federal Circuit Courts.

This decision of the Seventh Circuit Court herein conflicts with the decision in *Hughes* v. *Commissioner of Internal revenue* (1939) (C. C. A. 9th), 104 F. 2d 144, wherein the applicable local law of trusts is followed in holding that a trust is presumed irrevocable unless specifically declared to be revocable.

The Illinois law (references under Reason I hereinabove) is identical with the Massachusetts law (131 A. L. R. 457, 458, 469) held applicable in the *Hughes* case, *supra.*

It is the duty of Circuit Court of Appeals to apply state laws as found in state decisions, irrespective of what such court may regard as its merits. *Kraus* v. *Greenborg* (1943) (C. C. A. 3rd), 137 F. 2d 569.

The law to be applied in any case is the law of the state. *Alameda County* v. *U. S.* (1941) (C. C. A. 9th), 124 F. 2d 611.

The petitioner urges that the decision of the Seventh Circuit Court of Appeals in the instant case is:

1—In conflict with a decision of another Circuit Court on the same matter, and on which the "state law" in the applicable states of the two Circuit Courts are identical; and is

2—In conflict with applicable local decisions.

REASON VI.

The Decision of the Seventh Circuit Court Herein Conflicts With Applicable Local Law.

The Seventh Circuit Court has failed to apply the local law of Illinois and by its decision has established its own "General Law" of trusts.

The Illinois law holds that:

1—A voluntary trust is presumed to be irrevocable unless a specific declaration makes it revocable.
Harris Trust and Savings Bank v. *Morse, supra;*
Williams v. *Evans, supra;*
Hubbard v. *Buddemeir, supra;* 131 A. L. R. 457, etc.

2—A voluntary trust may be revoked by consent if the the settlor and all the beneficiaries are *sui juris* and consent, but where there are holders of contingent or vested interests who have not consented, the trust cannot be terminated.
Botzum v. *Havana National Bank* (1937), 367 Ill. 539, 12 N. E. 2d, 203, 131 A. L. R. 469.

3—The burden was upon the trustees-respondents to show that August Luer had reserved the power to revoke the trust since the voluntary creation of the trust was admitted.
Dobroth v. *Jensen,* 348 Ill. 167.

4—August Luer could not revoke the trust by mere destruction of the trust instrument.
William v. ***Evans,*** 154 Ill. 98.

5—The burden was upon the trustee-respondents to overcome the presumption arising from the doctrine of despoiler of the evidence.
Hudson v. *Hudson,* 287 Ill. 286;
Nofftz v. *Nofftz,* 290 Ill. 36.

6—A fiduciary claiming estoppel against a *cestui que* trust must show that he has exercised the utmost good faith in dealing with the *cestui que* trust.
Auer v. *Wm. Myer Co.,* 322 Ill. A. 344; 54 N. E. 2d 394.

To summarize:

The presumption of Illinois law applicable to the instant case is that a voluntary trust is presumed to be irrevocable unless by its specific terms it is made revocable.

The rule of local law was ignored by both the District Court and the Circuit Court of Appeals.

Furthermore, the evidence of record established the trust to be irrevocable by its terms.

There was no evidence to show that the trust contained any reserved power of revocation.

CONCLUSION.

The Supreme Court in its decision in *Erie R. Co.* v. *Tompkins* intended the doctrine of that case should be applied by the Federal courts to the issues of a case such as herein presented.

That the Seventh Circuit in the instant case has disregarded the doctrine of *Erie R. Co.* v. *Tompkins* and the laws of Illinois and substituted its own independent judgment and applied an unwritten general law in the manner of the doctrine of *Swift* v. *Tyson* is respectfully submitted.

Thus, we have an unconstitutional assumption of powers by the federal courts of the United States which this Honorable Court should not hesitate to correct.

WHEREFORE, that the Writ of Certiorari should be granted is

Respectfully submitted,

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Intervening-Respondents.

BRIEF IN SUPPORT OF PETITION.

No Consent From Beneficiaries for Destruction of Trust.

The respondents admit all the circumstances surrounding the execution of the trust instrument by their father in February, 1930.

August Luer arranged a meeting so that he could inform all the children of his plan and presented them with the trust instrument which they all read; then it was signed by him and the three sons, the respondents, as trustees.

Two years and ten months later the settlor, with the co-operation of the three respondents, destroyed the trust instrument and the duplicate copy.

Strange dealings—to destroy all of the documentary evidence, the "why" of which was not answered by the respondents.

The destruction of the instruments cannot be asserted to be consistent with honest dealings or justifiable purpose. They should have been preserved by the trustees for benefit of *cestui que* trusts, if the *contra* were true.

If all beneficiaries were agreeable and sui juris, of course they could have agreed with the father to terminate the trust. However, there is no evidence in the record showing consent to or even knowledge of the destruction of the trust instrument.

This is the crucial point of the facts of this case.

All of the original beneficiaries were living in December, 1932, when the trust instrument and all copies were destroyed. They were the three sons, the petitioner, the other daughter, the settlor's wife, and the nine children of the five beneficiaries.

The record reveals that the trustees were to pay the income to the father for his life, afterwards to his widow for her life, and then divide the corpus between the five children and/or the lineal descendents of any deceased child.

Therefore, to have legally terminated the trust in December, 1932, or January, 1933, the trust settlor, father, would have had to secure the consent of all the beneficiaries, including contingent remaindermen; otherwise, by common law and local applicable law, the trust still is valid.

Botzum v. *Havana Nat. Bank* (1937), 367 Ill. 539;

May v. *Marx* (1939), 300 Ill. App. 144; 20 N. E. (2d) 821;

Sutliff v. *Aydelott* (1940), 373 Ill. 633; 27 N. E. (2d) 529; 131 A. L. R. 457.

Neither the respondent's answer alleges nor does the evidence show any consent from the 1) settlor's other daughter, 2) from his wife or 3) from the contingent remaindermen. (No citations can be given because the record is silent.)

The petitioner denied that she gave her consent or had knowledge of the destruction, but the Court ruled she was estopped to so assert or prove the existence of a valid trust.

Nevertheless, if the Court had correctly applied the local law that the trust is presumed to be irrevocable, then, since there was no proof that *all beneficiaries* had joined in the termination, the decision would have been that a valid trust still was in existence.

The Decision Resurrects the Repudiation Doctrine of Swift v. Tyson.

It Will Establish Again a Basis for Discrimination by Non-Citizens Against Citizens, Create Uncertainty and Render Impossible Equal Protection of the Law.

In the instant case the federal courts determined that:

(1) The Luer trust instrument is presumed to be revocable;

(2) The burden was upon petitioner to prove that the trust was irrevocable by its terms, and that

(3) The local law that a trust is presumed to be irrevocable can be disregarded by a federal court, who may freely apply their independent judgment, thus establishing in the Seventh Circuit an unwritten "general law" *contra* to the common law and local law of trusts and to the statutes of the United States and the decisions of this Court, as will be discussed hereinafter.

The Decision of the Circuit Court Thus Creates a Transcendental Body of the Law of Trusts Outside of Any Particular State But Obligatory Within the Seventh Circuit.

Thus, individual citizens willing to move from their own state and become citizens of another might so avail themselves of this federal rule, and without even a change of residence, a corporate citizen of the state (who was a trustee) could avail itself of the federal rule by re-incorporating under the laws of another state, as was done and permitted in the *Taxicab Cases*[4] when the doctrine of *Swift* v. *Tyson* was in effect.

The trust was created in Illinois, the settlor and trustees were all residents of Illinois, and the seat of the trust property was there.

Under the law of Illinois, a trust which has been perfectly created cannot be revoked unless the power of revocation has been reserved.

Harris Trust & Savings Bank v. *Morse*, 238 Ill. A. 232;
Williams v. *Evans*, 154 Ill. 98;
Hubbard v. *Buddemeier*, 328 Ill. 76.

In the Opinion, this law was ignored without comment. (R. 251 to 256)

The local law of trusts places upon the trustee-respondents the burden to show that August Luer had the power to revoke the trust.

Dobroth v. *Jensen*, 348 Ill. 167.

This they failed to do. There is neither testimony nor documentary evidence in the records to show that August

[4] *Black and White Taxicab and Transportation Co.* v. *Brown and Yellow Transfer Co.*, 276 U. S. 518—48 S. Ct. 404, which case applied the doctrine of *Swift* v. *Tyson*, 16 Pet. 1, 18, 10 L. Ed. 865 which has been since overruled by *Erie R. Co.* v. *Tompkins*, 304 U. S. 64—58 S. Ct. 817.

Luer had any reserved power to revoke the trust. Consequently, he could not have revoked the trust by destroying the instrument.

William v. *Evans,* 154 Ill. 98.

This is particularly true in view of the fact that August Luer and the trustee-respondents had destroyed the trust instrument, and the burden was upon them to overcome the presumption arising from the doctrine of despoiler of the evidence.

Hudson v. *Hudson,* 287 Ill. 286;
Nofftz v. *Nofftz,* 290 Ill. 36.

Circuit Court Ignores Erie R. Co. v. Tompkins. Resurrects the Repudiated Doctrine of Swift v. Tyson.

The Circuit Court has departed from the rule of this Court as stated in *Erie R.* v. *Tompkins, supra,* and resurrects the repudiated rule of *Swift* v. *Tyson, supra;* and we find that the Circuit Court, in its Opinion establishes a strange doctrine of the law of trusts—an unwritten "general law" heretofore condemned by this Court and in conflict with the decisions of other federal courts and in direct conflict with the law of Illinois (see Illinois citations above). The Circuit Court affirmed the District Court and held

> (R. 253) "* * * the plaintiff failed to establish her allegation of irrevocability of the trust."
>
> (R. 252) "It may be such a trust they could not terminate on agreement, but I have no evidence it was such a trust instrument as that."

The Circuit Court gives neither citations nor legal reasoning and ignored the citations in the briefs of petitioner.

There can be only one conclusion and that is, *the Circuit Court of the Seventh Circuit has used its independent judgment in the field of trusts and seeks to establish a new rule of unwritten "general law" of trusts.*

Should this Court fail to grant this petitioner's writ and review and correct this decision, then the rule of *Erie R.* v. *Tompkins, supra,* will be undermined and the rule of *Swift* v. *Tyson, supra,* again will come to life.

The constitutional doctrine announced by this Court in *Erie R. Co.* v. *Tompkins, supra,* is still fresh in the minds of all. That case holds that

1) There is no unwritten "general law" or transcendental body of law outside of any particular state;

2) Federal courts do not have the power to use their judgment as to when to apply the rules of common law;

3) In federal courts, except in matters governed by federal constitution or by acts of Congress, the law to be applied in any case is law of the state[5];

4) The unwritten "general law" doctrine of *Swift* v. *Tyson* is unconstitutional and is overruled.

This decision of the Seventh Circuit offends not only the decision of this Court in *Erie R. Co.* v. *Tompkins, supra,* but also the reasonings of the host of legal writers[6] who supplied the background relied upon by this Court as the basis for the overthrow of the repudiated reasoning in *Swift* v. *Tyson, supra.*

It has been held by this Court that under the rule in *Erie R. Co.* v. *Tompkins, supra,* state law is applicable to all cases except in matters governed by the Federal Constitution or by acts of Congress and treaties. *Board of Com-*

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[5] Section 34 of Federal Judiciary Act of September 24, 1789, c. 20, 28 U. S. C. A. Sec. 725, and *Erie R. Co.* v. *Tompkins.*

[6] See footnotes to *Erie* v. *Tompkins* in 58 S. Ct. at pages 818 to 822, Incl. Even the Congress considered bills to change the effect of the decision in *Swift* v. *Tyson* and to mitigate its discrimination.

missioners v. *United States,* 308 U. S. 343, 60 S. Ct. 285; 84 L. ed. 313.

The rule was held applicable to suits in equity. *Richlin* v. *New York Life Insurance Co.,* 304 U. S. 202, 58 S. Ct. 860, 81 L. ed. 1290.

Estoppel and Competency of Petitioner to Testify.

This suit was commenced (R. 2) by suit against the three individual respondents as "trustees" of a voluntary trust created by a trust instrument signed by August Luer and the three trustees.

The settlor is now deceased and the Alton Banking and Trust Company is the executor of the last will and testament of the settlor and as such it intervened in this action between petitioner and three individual respondents. (R. 38)

In its capacity as Executor, the bank urged upon the District Court that neither the petitioner nor her husband were competent as witnesses under Chap. 5, Ill. Rev. Stat. 1943, Pars. 1, 2, 3, 4, and 5, on the theory that since their intervention, the suit was now against them as the Executors of the Estate of August Luer. (R. 98, 99, 100)

The Court heard the testimony (R. 101). However, the Opinion indicates that the Court disregarded petitioner's testimony and allowed the objection made to her competency as a witness. The Court held petitioner was estopped to now assert the existence of a valid trust. (R. 233)

The rule concerning evidence to prove lost documents has been settled by this Court in *Tayloe* v. *Riggs,* Pet. 591, 6 L. ed. 140.

> "Where it is proven that instrument is destroyed, the party may read a counterpart, or if no counterpart, an examined copy, or if no such copy, *may give parole* evidence of the contents." (Italics supplied)

In its capacity as Executor, the bank also urged in their argument to the Circuit Court that there was an "Estoppel of Record" operative against the petitioner.

The theory of the "Estoppel of Record" being that the petitioner did not object to the sale by the Executor and the purchase by Herman F. Luer of certain corporate stocks on July 26, 1943, and, therefore she is now "estopped" to establish a trust against and secure an accounting from Herman F. Luer and his brothers, because the corporate stock purchased by Herman F. Luer was the same stock once a part of the corpus of the trust. (R. 11, 66)

As Executor the bank urged that the petitioner does not have "clean hands" because, it asserts, she did not object to the sale to Herman F. Luer.

Let us examine the record.

1) Herman F. Luer admits in his answer that in February, 1930, he became a trustee under the Luer trust. (R. 7, 8)

2) Herman F. Luer admits in his answer that in January, 1933, at the request of the settlor, August Luer, he transferred these corporate stock from *his name as trustee* to the name of the settlor. (R. 11)

3) April 3, 1943, or a date later, petitioner filed a motion to intervene and vacate a judgment in a local action in which Herman F. Luer was a party and in which motion the petitioner sets out the existence of the trust with Herman F. Luer as one of the trustees of the property of August Luer. (R. 31 to 36)

4) Herman F. Luer is a stockholder, officer and director of the Alton Banking and Trust Company, the Executor. (R. 4, par. 10, R. 11)

5) July 26, 1943, Herman F. Luer, as an individual, purchased from the Alton Banking and Trust Company, (of which bank he is an official), these corporate stocks. (R. 66)

6) September 27, 1943, petitioner filed her suit in the Federal District Court against Herman F. Luer and

his two brothers to establish the trust admittedly created February 17, 1930, and for an accounting. (R. 6)

7) Herman F. Luer in his several capacities has known or should have known since February 17, 1930, the true facts concerning the ownership of these corporate stocks.

8) Since April 3, 1943, at least, he has known that the petitioner claimed that he was a "trustee" of a valid trust and that these stocks were a part of the corpus.

9) Now Herman F. Luer is an officer of the bank which says the petitioner is "estopped" to assert the present existence of a trust with Herman F. Luer as trustee thereof because Herman F. Luer as an individual wants to remain safe and secure as the purchaser of corporate stocks from the bank (of which he is an officer). Even though the corporate stocks were once held in his name as one of the trustees of the trust.

The defense of "estoppel" and "clean hands" doctrine is not for Herman F. Luer or the bank to assert.

Herman F. Luer as an individual knew since February, 1930, that these corporate stocks were at one time a part of the trust of which he was a trustee, and at least since April, 1943 he knew that the petitioner claimed they still were a part of the trust. Therefore, when he purchased these same corporate stocks in July, 1943, from the bank of which he was an officer, he was a purchaser with notice, and the defense of "Estoppel of Record" is not available against the petitioner.

However, the Court of Appeals affirmed the District Court which, in its conclusion of law, stated

> (R. 233) "That in any event plaintiff is by her conduct estopped from now asserting the existence of a valid trust."

It appears that the Court applied the "estoppel" and "clean hands" doctrine against the wrong parties.

The doctrine of *laches* cannot be invoked when there is no notice and no injury or, prejudice will not result to the person claiming an estoppel.

United States v. *Dunn*, 286 U. S. 121;
Crimp v. *First Union Trust and Savings Bank*, 185 N. E. 179, 352 Ill 93;
Chadwick v. *Clapp*, 69 Ill. 119;
Continental Commercial Savings Bank v. *Lantry Contracting Co.*, 189 Ill. App. 296.

There can be no estoppel by judgment unless the identity of the parties, the thing to be recovered and the cause of action are the same.

DeMets, Inc. v. *Insull*, 122 Fed. 2d 755;
Harding v. *Harding*, 186 N. E. 152, 352 Ill. 417, 88 A. M. R. 563.

The doctrine of estoppel cannot be invoked as an instrument of fraud and will not be invoked in favor of one who is not an innocent purchaser.

Drain v. *LaGrange State Bank*, 303 Ill. 330, 135 N. E. 780;
Whitlock v. *McClusky*, 91 Ill. 582.

A fiduciary claiming estoppel against a *cestui que* trust must show that he has exercised the utmost good faith in dealing with the *cestui que* trust.

Auer v. *Wm. Meyer Company*, 322 Ill. A. 344, 54 N. E. 2d 394;
Lipscomb v. *Allen*, 298 Ill. 537, 132 N. E. 206.

Everything will be presumed against the despoiler of evidence.

Hudson v. *Hudson*, 287 Ill. 286, 122 N. E. 497;
Nofftz v. *Nofftz*, 290 Ill. 36, 124 N. E. 638;
Anderson v. *Irwin*, 101 Ill. 411.

It must not be overlooked that the trustees co-operated with the settlor, August Luer, in destroying all the copies of the trust instrument, which it must be admitted is an extraordinary performance upon which to base a claim that the trust was legally terminated. Why the respondents (all of whom are officers and directors of a bank) did not desire to preserve the trust instrument thereby enabling them to give a ready accounting of their trusteeship to the beneficiaries, is not explained in the record. If the settlor had a legal right to terminate the trust, that could have been done by a sufficient document which also should have been preserved to show good faith and legality.

The law says "this is your own act and therefore you are not damnified"—estoppel is invoked against a person who prevents a thing from being done. *R. H. Stearns* v. *U. S.*, 291 U. S. 54, St. Ct. 329.

CONCLUSION.

No Federal General Law—Local Law Governs.

Erie R. Co. v. *Tompkins* held that there was no "general law" of torts to be applied by the federal courts independent of the local law which was the law of the case. The decision explicitly overruled the century-old doctrine of *Swift* v. *Tyson* and held that doctrine to be unconstitutional.

Seventh Circuit Resurrects Doctrine of Swift v. Tyson—Disregards Local Law—Applies Its General Law.

The Erie decision was handed down seven years ago. Is it possible that some of the lower federal courts still cling to the doctrine of *Swift* v. *Tyson*?

Are some of the lower federal courts waiting for the doctrine of the Erie decision to be explicitly extended to a case involving the law of trusts and in the meantime follow *Swift* v. *Tyson* and apply their own general law doctrine of trusts?

By the decision in the instant case, the Seventh Circuit is in direct conflict with the Supreme Court in the Erie case, and if the decision is allowed to stand, it will re-establish the doctrine of *Swift* v. *Tyson*.

Illinois Law.

Presumption Trust Is Irrevocable.

The Illinois law is clear and follows the common law:

> "A voluntary trust is irrevocable unless by specific declaration it is made revocable" (131 A. L. R. 457).

The circuit court held:

> (R. 253) "* * * the plaintiff failed to establish her allegation of irrevocability of the trust."
>
> (R. 252) "It may be such a trust they could not terminate on agreement, but I have no evidence it was such a trust agreement as that."

There is neither evidence of record nor finding by the lower court that the trust a) contained any clause reserving any power of revocation, or, b) that August Luer exercised any reserved power of revocation (no citations).

The Court holds (R. 255), contra to local law, that August Luer revoked the trust by destruction of the original and copy and that petitioner has failed to establish that such action on the part of August Luer was without authority and void, and further that petitioner is estopped to prove a valid trust. Therefore, the lower court disregarded the Illinois law of the case and applied its own independent judgment and its own general law in holding:

1) The trust instrument was revoked by its destruction;

2) That August Luer had the authority to revoke the trust;

3) That the burden was upon petitioner, the *cestui que* trust, to prove the action of August Luer without authority and void;

4) That the burden was upon petitioner to prove that the trust instrument contained a clause making it irrevocable;

5) That the petitioner is estopped to prove a valid trust;

The lower court disregarded:

6) The presumption of Illinois law that a voluntary trust is presumed to be irrevocable;

7) The positive rule of law that revocation of a voluntary trust must be reserved in the trust instrument.

8) The rule of law that he who creates a trust estate creates an estate no longer his own;

9) The presumption against the despoiler of evidence.

Thus we have an unconstitutional assumption of powers by the federal courts of The United States which this Honorable Court should not hesitate to correct.

WHEREFORE, that the Writ of Certiorari should be granted is

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(6)

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IN THE

SUPREME COURT OF THE UNITED STATES.

No. 490.

AUGUSTA M. TURNER,
Petitioner,

v.

CARL A. LUER, WILLIAM J. LUER, HERMAN F. LUER,
Respondents,

ALTON BANKING AND TRUST COMPANY, a Corporation,
Executor of the Last Will and Testament of
August Luer, Deceased,
Intervening Respondent.

REPLY OF RESPONDENTS

To the Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit,

and

BRIEF IN SUPPORT THEREOF.

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INDEX.

Page

Reply of respondents 1-9

Statement of facts 1

As to petitioner's questions 6

As to petitioner's reasons relied upon 7

Conclusion 8

Brief and argument in support of respondent's reply 11-25

Summary of argument 11

Argument 14

I. The opinions of the Circuit Court and the District Court do not establish an unwritten "general rule" of the law of trusts contrary to the common law and applicable local law of Illinois 14

II. The rule of estoppel against the petitioner was proper, both under the law of Illinois and under the decisions of the Federal Courts .. 17

III. The decision does not re-establish the rule of Swift v. Tyson; the decision does not overrule the doctrine of Erie R. Co. v. Tompkins 20

IV. Erie R. Co. v. Tompkins suggests grave discrimination by petitioner against respondents 22

Conclusion 25

Cases Cited.

Albrecht v. Wolf, 58 Ill. 186 15

Benson v. Dempster, 183 Ill. 297, 311 19

Brown v. Brown, 154 Ill. 35, at 43 17

Carlock v. Carlock, 249 Ill. 330, 339 19

Dempster v. Rose Hill Cemetery Co., 206 Ill. 261, at page 271 18
Dowland v. Staley, 201 Ill. A. 6 15
Erie v. Tompkins, 304 U. S. 64 .....6, 7, 8, 21, 24, 25
Grymes v. Sanders, 93 U. S. 55, at 62 19
Hammond v. Hopkins, 143 U. S. 224 19
Harris Trust & Savings Bank v. Morse, 238 Ill. A. 232 14
Horne v. Ingraham, 125 Ill. 198 15
Hubbard v. Buddemeier, 328 Ill. 76 14
Laughlin v. Mitchell, 121 U. S. 411 19
McDearmon v. Burnham, 158 Ill. 55, 62 19
Moore v. Taylor, 251 Ill. 468 19
Neagle v. McMullen, 334 Ill. 168, 182 19
Philippe v. Philippe, 115 U. S. 151 19
Shovers v. Warrick, 152 Ill. 355, 360 19
Simpson v. Manson, 345 Ill. 543, at page 554 15
Simpson v. Manson, 345 Ill. 543 15
Swift v. Tyson 6, 7, 8, 21
Whittaker v. City of Carbondale, 55 F. Supp. 72 15
Williams v. Evans, 154 Ill. 98 .....14, 21

Statute Cited.

Judicial Code, Sec. 240, as amended (Title 28, U. S. C. A. 347) 12

Textbook Cited.

Restatement of the Law, Volume on Trusts, Sec. 219.. 15

Law Quarterly Cited.

Cornell Law Quarterly, June 1928, pp. 525, 526, "Distribution of Judicial Power Between United States and State Courts" 20

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To the Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Because petitioner's "statement of the matter involved" is not accurate, it is necessary for the respondents briefly to set forth such facts and rulings as are material to the issues presented by the petition.

STATEMENT OF FACTS.

This is an action in equity, brought by the petitioner, Augusta M. Turner, of University City, Missouri, on September 27, 1943, against the respondents, Carl A. Luer, William J. Luer and Herman F. Luer of Alton, Illinois. The respondents are brothers of the petitioner. By her action, petitioner seeks to have construed as irrevocable

and still valid and in effect a certain trust instrument executed by the father of the litigants, August Luer, on February 17, 1930. In their answer the respondents admit the execution of the trust, but allege that their father revoked and destroyed it in January of 1933. They deny that the trust was irrevocable.

The respondents were appointed trustees under the trust, and the beneficiaries were August Luer himself and his wife, Helen Luer, as life tenants, and at their deaths their five children, Augusta M. Turner (the petitioner), Helen Peterson, Carl A. Luer, Herman F. Luer and William J. Luer, took the trust estate in equal shares.

The property conveyed in the trust consisted of 95 shares of stock of Luer Building Company, 150 shares of stock of Alton Storage and Hotel Company, and one promissory judgment note, dated February 17, 1930, in the sum of $56,993.94, payable to August Luer, and signed by the petitioner, Augusta M. Turner.

The shares of stock and the note were not delivered by August Luer to the trustee sons until December 1, 1932, at which time one certificate of stock for 95 shares in Luer Building Company and six certificates for 25 shares each in Alton Storage and Hotel Company were issued to the sons as trustees. All of these certificates were assigned and transferred back by the trustee sons to their father one month later on January 3, 1933. The promissory note for $56,993.94, executed by the petitioner, Augusta M. Turner, also was assigned back to the father, August Luer.

August Luer died September 22, 1942, in Madison County, Illinois. Alton Banking and Trust Company, intervening defendant, is the executor of his last will and testament. In its answer the bank alleges that proceedings had been instituted in the Probate Court of Madison County, Illinois, and that on December 3, 1942, an inventory of the estate was filed and regularly approved. On May 21, 1943, a petition was filed in the Probate Court, to

sell the assets of the estate at public sale, notice of the hearing on the petition to sell was given to the petitioner, Augusta M. Turner, and at her request several continuances were granted by the Probate Court. On June 7, 1943, a hearing was held and an order of sale was entered. The public sale was held and a report thereof approved without objection or appeal by Augusta M. Turner. Authenticated copies of the probate court proceedings are attached to the bank's answer (R. 48 through 72).

The foregoing facts are set forth in points I, II, III and IV of the "Findings of Fact and Conclusions of Law" of the United States District Court in which this case was tried (R. 229, 230). In her assignment of error on appeal to the United States Circuit Court of Appeals for the Seventh Circuit, the petitioner herein, Augusta M. Turner, did not question these points.

The trial court further found that August Luer, between December 1, 1932, and January 3, 1933, revoked the trust in question and destroyed the original and copy of the trust instrument, which he had executed February 17, 1930. He found that the petitioner herein, Augusta M. Turner, had failed to establish by the evidence that such action on the part of August Luer was without authority and void, but that she, by her conduct, accepted such revocation of the trust as valid and binding upon all parties (R. 231).

The trial court further found that the petitioner had knowledge of the destruction of the trust instrument and the return of trust assets to her father, August Luer. During a period from 1930 until after 1937 she was the owner of stock in Luer Building Company, and her father, during this same period, was continuously president of the company. She frequently signed proxies for him to vote her stock at annual stockholders' meetings. On June 29, 1933, and on May 29, 1935, she signed "waiver agreements" with her father and the other stockholders of the company which were headed, "We, the undersigned, being all of the stock-

holders of Luer Building Company, etc." On May 29, 1935, she personally attended the annual stockholders' meeting of the Luer Building Company, which meeting was attended by all stockholders. None of the respondents attended any of these meetings, either as trustees, stockholders or otherwise. By reason of the foregoing, the trial court found that the petitioner, Augusta M. Turner, by and through the "waiver agreements" and her attendance at stockholders' meetings had notice and knowledge of the revocation of the trust instrument and the resumption of control and ownership of the stock of Luer Building Company by her father, August Luer; that "between the time of the revocation of the trust in January, 1933, and the death of her father in September, 1942, the plaintiff (petitioner) did not complain or otherwise object to such revocation" (R. 231).

The trial court further found that the petitioner had received full and adequate notice of the proceedings in the Probate Court of Madison County, and that after the death of August Luer, all the trust property was inventoried as assets of his estate. On the filing of a petition to sell these assets at public sale she appeared in the Probate Court, and she had knowledge that the assets to be sold included the stock which had been conveyed in the trust instrument on February 17, 1930. Notwithstanding such knowledge, she did not protest, but allowed the stock to be sold at public sale, and she did not thereafter file any objection to the report of said sale or to its approval by the Probate Court of Madison County, Illinois (R. 232).

The trial court further found that the petitioner, Augusta M. Turner, prior to filing her action in the United States District Court, intervened in a certain action pending in the Circuit Court of Madison County, Illinois, and sought to have certain judgments of the Circuit Court of Madison County, Illinois, vacated. In support of her motion to vacate she attached her affidavit reciting, in effect, all the

matters which are set forth in her complaint in the United States District Court. In the proceedings in the Circuit Court of Madison County, Illinois, the motion filed by the petitioner was denied and she did not prosecute any appeal from the order denying her motion (R. 232).

From the foregoing finding of facts the trial court concluded as a matter of law:

> "1. That plaintiff (petitioner) has failed to prove the material allegations of her complaint.
>
> "2. That the revocation by August Luer of the trust instrument in question was an effective and valid revocation for all purposes.
>
> "3. That in any event plaintiff (petitioner) is by her conduct estopped from now asserting the existence of a valid trust.
>
> "4. That plaintiff (petitioner) is not entitled to the relief prayed for in her complaint" (R. 232, 233).

On July 11, 1944, a judgment order was entered in the District Court dismissing the complaint of Augusta M. Turner for want of equity, and on October 6, 1944, she filed an appeal to the United States Circuit Court of Appeals for the Seventh Circuit.

On April 24, 1945, the Circuit Court of Appeals for the Seventh Circuit filed in the office of the Clerk the opinion of the Court affirming the judgment of the District Court.

The opinion is short. As petitioner says on page 7 of her Petition herein, "The Opinion of the Circuit Court contains neither citations, references to appellant's authorities nor legal reasoning or explanation for disregarding Illinois law or the genesis of the announced unwritten 'general law.' "

A careful examination of petitioner's Petition will fail to disclose just what "general law"—as contrary to the

law of Illinois—is announced in the opinion of the Circuit Court of Appeals, unless it be in the paragraph in the opinion that * * *

> "On the issue of irrevocability, the trial judge announced orally:
>
> "'I don't think there is evidence here that the Court would be justified in undertaking to find that this trust instrument was not under any circumstances irrevocable. * * * I do not hardly feel I could possibly as a finding of fact here conclude there was any such trust instrument as contended for by the Plaintiff in her complaint. I think her evidence falls short of the degree of proof the Court must have to reconstruct this trust instrument. I think she is not at fault being unable to produce anything, but on the other hand the circumstances all indicate here **that the trust was terminated by her agreement** (emphasis ours). I think the circumstances clearly indicated, I thought they did on the motion for the summary judgment on the documentary proof of what transpired in the Probate Court the other day would rather indicate she acquiesced in its termination. It may be such a trust they could not terminate on agreement, but I have no evidence it was such a trust instrument as that'" (R. 252).

* * * * * * *

Not only is petitioner's "statement of the matter involved" highly inaccurate with reference to facts, but it also is argumentative and frequently erroneous with reference to propositions of law. These we will consider more fully in our brief.

AS TO PETITIONER'S "QUESTIONS."

The three "questions" posed on page 8 of the Petition herein, as to whether the doctrine of Swift v. Tyson should be re-established, are wholly without foundation in the

record in this case. As a matter of fact, the application of the legal principles laid down by Mr. Justice Brandeis in Erie R. Co. v. Tompkins to the status of the petitioner, Augusta M. Turner, will do her a lot more harm than good. This also is a matter for discussion in the brief.

AS TO PETITIONER'S REASONS RELIED UPON.

I.

The decision of the Circuit Court herein does not establish any unwritten general rule of law of trust contrary to the common law and applicable local law of Illinois. The decision merely holds that the trust created by August Luer in 1930 was revoked by him in 1932, 10 years prior to his death, and that the petitioner had knowledge of such revocation and acquiesced therein.

II and III.

The decision does not resurrect the doctrine of Swift v. Tyson which was overruled in Erie v. Tompkins, because the decision announces no new "general law" of trusts, but on the contrary is founded solidly on both Illinois and Federal laws and is entirely in harmony with such laws. The only rule laid down by the decision is that the trust in question could be and was revoked by the consent of the parties in interest.

IV.

The petitioner does not point out in any respect wherein the decision is applicable to the "Federal Gift Tax Statute."

V.

The decision is no more in conflict with other Federal Courts than it is with the laws of Illinois. The decision does not hold that any trust is presumed to be revocable.

It simply holds that the trust in question was revoked by August Luer, father of the petitioner, and that the petitioner had knowledge of such revocation and consented thereto, or by her actions acquiesced in such revocation.

VI.

The decision does not conflict with the laws of Illinois. It does not attempt to pass upon the presumption that a voluntary trust is irrevocable, but holds only that it can be revoked by the consent or acquiescence of the parties. The decision properly holds the petitioner was estopped by her own conduct to deny or question the revocation of the trust by her father 10 years prior to his death.

CONCLUSION.

It is sufficient to say here that with reference both to petitioner's "questions" and her "reasons relied upon for allowance of writ," that the decision of the Circuit Court of Appeals for the Seventh Circuit herein does not establish an unwritten "general law" contrary to the local law of Illinois, and does not resurrect the doctrine of Swift v. Tyson which was overruled in Erie R. Co. v. Tompkins. It does not conflict with decisions of the Illinois courts, or with the common law in Illinois or with decisions of other federal circuit courts on the same matter. Rather does it stand firmly on both Illinois and Federal law and is in conformity in all respects with such laws.

An examination of the very Illinois decisions cited by petitioner will disclose no inconsistencies in the opinion of the Circuit Court of Appeals for the Seventh Circuit or in the Findings and Conclusions of Law of the United States District Court for the Southern District of Illinois

with these Illinois decisions. This being true, there is no unconstitutional assumption of power by the federal courts and the petition for certiorari should be denied.

Respectfully submitted,

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Intervening Respondent.

BRIEF AND ARGUMENT

in Support of Respondent's Reply to the Petition for a Writ of Certiorari.

SUMMARY.

I.

The Opinions of the Circuit Court and the District Court Do Not Establish an Unwritten "General Rule" of the Law of Trusts Contrary to the Common Law and Applicable Local Law of Illinois.

An examination of the Findings of the District Court and the Opinion of the Circuit Court of Appeals will disclose no new unwritten "general rule" of the law of trusts. Both the Federal Courts, including the Supreme Court of

the United States and the State Courts of Illinois, have consistently held that a trust may be revoked by the consent of the parties. The record in this case discloses that both the District and Circuit Courts found, as a matter of fact, that the petitioner consented to the revocation and destruction of the trust created by her father, and that by her conduct for almost ten years after the destruction of the trust and prior to the death of her father she acquiesced therein. The contention of the petitioner that there was "no consent from beneficiaries for destruction of the trust," which appears on page 15, is purely argumentative and contrary to the Findings of Fact by both the District and Circuit Courts. It is not grounds for certiorari under Section 240 of the Judicial Code, as amended (Title 28, U. S. C. A. 347).

II.

The Rule of Estoppel Against the Petitioner Was Proper, Both Under the Law of Illinois and Under the Decisions of the Federal Courts.

Petitioner was permitted to testify fully in the case and the Trial Court heard her testimony. The opinion does not indicate that the Court allowed any objection made to her competency as a witness. It held simply that there was evidence in the record sufficient to sustain a Finding of Fact that she had knowledge of the revocation and destruction of the Trust and that by her conduct for a period of ten years she had acquiesced in such revocation. The evidence as to this knowledge and acquiescence was both documentary and oral. Again, both District and Circuit Court concurred in Findings of Fact concerning the knowledge and acquiescence, by conduct on the part of the petitioner.

III.

The Decision Does Not Reestablish the Rule of Swift v. Tyson; the Decision Does Not Overrule the Doctrine of Erie R. Co. v. Tompkins.

The decision must speak for itself. We submit that it announces no new "General Rule" of law contrary to the local law of Illinois.

IV.

Erie R. Co. v. Tompkins Suggests Grave Discrimination by Petitioner Against Respondents.

The record in this case discloses that the petitioner has more than had her day in court. The issues involved in this controversy, or some phase of them, have been tried in the Probate Court of Madison County, Illinois, in the Circuit Court of Madison County, Illinois, in the U. S. District Court for the Southern District of Illinois, and in the U. S. Circuit Court of Appeals for the Seventh Circuit. The holdings of all of these courts have been uniformly against the petitioner.

ARGUMENT IN SUPPORT OF RESPONDENTS' REPLY.

I.

The Opinions of the Circuit Court and the District Court Do Not Establish an Unwritten "General Rule" of the Law of Trusts Contrary to the Common Law and Applicable Local Law of Illinois.

The decisions of both the District Court and the Circuit Court of Appeals are fully set out in the record (District Court, R. 229 through 233; Circuit Court of Appeals, R. 251 through 256).

The decisions of both courts found only that the grantor, August Luer, had revoked the trust which he had created, and that his daughter, the petitioner herein, had, by her conduct, accepted such revocation (R. 231) and was, by her conduct, estopped from now asserting the existence of a valid trust (R. 233).

The Illinois cases relied on by the petitioner, and cited frequently in her petition and brief as voicing the local law, are:

Harris Trust & Savings Bank v. Morse, 238 Ill. A. 232 (Erroneously reported in Petition on p. 9 as 238 Ill. 232);
Williams v. Evans, 154 Ill. 98;
Hubbard v. Buddemeier, 328 Ill. 76.

Respondents do not deny the law of Illinois to be as expressed in these cases, viz., that a trust perfectly created is irrevocable. The instant decisions of the District and Circuit Court of Appeals neither ignore nor transcend that rule of law. Indeed, they expressly follow the rule laid down in Williams v. Evans, supra, that:

> "Where the beneficiaries of a trust are all competent to act and the trust estate is subject to no future

contingencies, and the beneficiaries have an absolute right to the trust estate, the trust may be terminated by a contract of all the beneficiaries."

The only rule of law followed by the District and Circuit Court of Appeals in this case is well expressed in Restatement of the Law, Volume on Trusts, sec. 219, as follows:

"(1) The beneficiary cannot hold the trustee liable for a breach of trust if he fails to sue the trustee for so long a time and under such circumstances that it would be inequitable to permit him to hold the trustee liable.

"(2) The beneficiary is not barred merely by the lapse of time from enforcing the trust, but if the trustee repudiated the trust to the knowledge of the beneficiary, the beneficiary may be barred by laches from enforcing the trust. (Such repudiation need not be in specific words; it may consist of conduct on the part of the trustee inconsistent with the existence of the trust.)"[1]

The Supreme Court of Illinois, in the case of Simpson v. Manson, 345 Ill. 543, not only laid down the rule in Illinois, but pointed out the complete harmony between the local and the "general law" as expressed by the Supreme Court of the United States. At page 554 it is said:

"Story said (3 Story's Eq. Juris., 14 Ed., Sec. 1973) 'It is often suggested that lapse of time constitutes no bar in cases of trust. But this proposition must be received with its appropriate qualifications. As long as the relation of trustee and cestui que trust is acknowledged to exist between the parties and the trust is continued, lapse of time can constitute no bar to an account or other proper relief for the cestui que trust. But **where this relation is no longer admitted to exist** (emphasis ours), or time and long acquiescense have obscured the nature and character of the

1 Annotations on (1): Whittaker v. City of Carbondale, 55 F. Supp. 72; (2) Horne v. Ingraham, 125 Ill. 198; Dowland v. Staley, 201 Ill. A. 6; Albrecht v. Wolf, 58 Ill. 186; Simpson v. Manson, 345 Ill. 543, etc.

> trust, or the acts of the parties or other circumstances give rise to presumptions unfavorable to its continuance, in all such cases a court of equity will refuse relief upon the ground of lapse of time and its inability to do complete justice. This doctrine will apply even to cases of express trust.' Approval of this principle was voiced by this court in Benson v. Dempster, 183 Ill. 297, where we also quoted the following from Hammond v. Hopkins, 143 U. S. 224: 'The rule is peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transaction complained of, or of the witness or witnesses, or by reason of the original transaction having become so obscured by time as to render the ascertainment of the exact facts impossible.' . . ."

In view of the foregoing, Augusta M. Turner, the petitioner herein, can hardly expect to persuade this Court to believe that the District and Circuit Court of Appeals have announced a new "general rule" of the law of trusts when the opinion of the Circuit Court says simply:

> "The trial court also found that plaintiff had knowledge of the revocation of the trust and acquiesced therein. . . . In support of this finding and this conclusion Judge Briggle discusses the evidence of plaintiff's participation in the meetings of the corporations, the stock of which constituted the corpus of the trust. She knew that her brothers did not participate as trustees. The stocks of these companies were listed in the inventory of her father's estate and she made no protest thereto; nor did she protest the sale of such stocks or the report of their sale" (R. 255).[2]

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[2] As to her knowledge of the termination of the trust, the court was doubtless influenced by the fact that the plaintiff must have learned of said cancellation from her attendance of the stockholders' meetings. It was perhaps equally impressed by the testimony of the vice-president of the local bank who told of the visit of the Turners, after the death of the father, seeking from him some documents the nature of which they were not certain. He called it a "hunting expedition." He enumerated many documents in an attempt to ascertain the nature of the instrument they were seeking and asked if it were a trust and "They said no, **that has been cancelled out a long time ago.** Mr. Turner made that statement. 'Q. In the presence of Mrs. Turner? A. Yes, sir'" (R. 255).

Of course this is not a new "general rule" of the law of trusts. Rather, it is a "recital of . . . evidence . . . to show there was substantial evidence to support both findings, either of which necessitated a decree for the defendants" (R. 256).

II.

The Rule of Estoppel Against the Petitioner Was Proper, Both Under the Law of Illinois and Under the Decisions of the Federal Courts.

Although the petitioner, Augusta M. Turner, denied that she had any knowledge of the revocation and destruction of the trust created by her father until after his death, there is substantial evidence in the record, both documentary and oral, to the contrary. The trust was destroyed in December of 1932 and the trust property restored to her father, August Luer, in January of 1933. Nine years and nine months later, August Luer died.

During the years preceding his death he was active in all his business affairs. One of the comapnies in which petitioner owned stock was Luer Building Company. She attended stockholders' meetings after the destruction of the trust, signed waivers, proxies, and conferred with her father concerning the meetings (R. 110, 111, 112, 113). None of the former trustees attended any of these meetings or signed any of the waivers, although some of them began with the statement—"We, the undersigned, being **all** of the stockholders of Luer Building Company, a corporation, etc." (R. 189, 191).

The rule in Illinois with reference to such situations is stated in Brown v. Brown, 154 Ill. 35, at 43:

> "But independently of other considerations, the laches of complainants precludes a recovery. Where a party has slept upon his rights or acquiesced for a

great length of time a court of equity will refuse relief. . . . The complainants pretend ignorance of the fact that the defendant was claiming under the deed. . . . They also knew, or by the exercise of ordinary diligence might have known, that the defendant was in the control of the property under the deed. There was no excuse for a want of knowledge that the defendant was claiming under the deed. . . . After learning of that fact, he allowed seven years to intervene before bringing an action. The delay was inexcusable."

The record discloses that prior to the trial in the District Court the attorneys for the petitioner took extensive depositions which they stipulated could be read in evidence. One of those depositions was that of C. A. Caldwell, retired, who, in 1930 and 1931 was president of Alton National Bank, and in 1933, president of First National Bank & Trust Company of Alton. This bank held the $30,000 note of M. E. Turner, husband of the petitioner, the endorsement of which caused August Luer to revoke the trust. Mr. Caldwell testified that he and his bank had learned of the trust (R. 222). He was asked by counsel for the petitioner:

"Q. Do you know whether it contained any provisions relative to whether it could be revoked?

A. I have no idea excepting that they told us when we raised the objection to it that it had been revoked.

Q. Who told you that? Do you remember?

A. I believe it was Mr. Turner" (R. 223).

The courts in Illinois have repeatedly expressed themselves about such situations. In Dempster v. Rose Hill Cemetery Co., 206 Ill. 261, at page 271, it was said:

"One important principle involved in the term 'laches' is that after a long lapse of years during which testimony is impaired or destroyed, witnesses

remove or die . . . and papers, letters, documents, books, records, etc., are lost or destroyed . . . the defendant is at the complete mercy of any claimant who may wish to take advantage of the situation. Time impairs and destroys evidence of the true facts and makes it practicably impossible to meet positive testimony of the complainants, whether the same be true or untrue. A court of equity, therefore, finding itself unable to render substantial justice between parties, asserts the principle of laches on the ground of public policy and for the repose of property rights."[3]

This, also, is the rule in the Federal Courts. It has been held that:

"It is true, as a general rule, that when the relation of trustee and cestui que trust is uniformly admitted to exist, and there is no assertion of adverse claim of ownership by the trustee, lapse of time can constitute no bar to relief. But when the trust relation is repudiated, or time and long acquiescence have obscured the nature and character of the trust, or the acts of the parties or other circumstances give rise to presumptions unfavorable to its continuance, in all such cases a court of equity will refuse relief on the ground of lapse of time and its inability to do complete justice."

Philippe v. Philippe, 115 U. S. 151;
Hammond v. Hopkins, supra;
Grymes v. Sanders, 93 U. S. 55, at 62;
Laughlin v. Mitchell, 121 U. S. 411.

In Laughlin v. Mitchell, supra, Mr. Justice Blatchford said:

"To wait until after his death, and until after the death of most of the persons who could have had any knowledge of the transactions, and after her father

3 Other Illinois decisions — Benson v. Dempster, 183 Ill. 297, 311; Shovers v. Warrick, 152 Ill. 355, 360; McDearmon v. Burnham, 158 Ill. 55, 62; Moore v. Taylor, 251 Ill. 468; Carlock v. Carlock, 249 Ill. 330, 339; Neagle v. McMullen, 334 Ill. 168, 182.

had, by will, disposed of his estate, presumably in some respects, in a manner otherwise than he would have done had he not believed himself possessed of this property, and then attack his will, would be inequitable and unjust."

III.

The Decision Does Not Re-establish the Rule of Swift v. Tyson; the Decision Does Not Overrule the Doctrine of Erie R. Co. v. Tompkins.

In January, 1842, Mr. Justice Story delivered an opinion in the case of Swift v. Tyson which announced as a rule of the Supreme Court of the United States that "Undoubtedly, the decisions of local tribunals upon such subjects are entitled to, and will receive the most deliberate attention and respect of this Court; but they cannot furnish positive rules or conclusive authority, by which our own judgments are to be bound up and governed."

In the years that followed a great deal of confusion resulted from the application of this rule. It was said that the injustice and confusion incident to the doctrine were repeatedly urged as reasons for abolishing or limiting jurisdiction of the Federal Courts on the ground of diversity of citizenship.

In the Cornell Law Quarterly for June, 1928, appeared an article by a professor of law at Harvard Law School, entitled "Distribution of Judicial Power Between United States and State Courts." The professor was Felix Frankfurter. The article said, in part (p. 525, 526):

> "The various types of diversity litigation call for concrete scrutiny in the light of present-day conditions and the demands upon federal courts by peculiarly federal litigation. The right to remove to the federal court a litigation between two non-residents in a state court will not survive analysis. . . . Whatever is to remain of diversity jurisdiction, the law to

be administered by the federal courts is the law of the states. Whenever that law is authoritatively declared by the state, either by legislation or by adjudication, state law ought to govern in state litigation, whether the forum of application is a state or federal court. Swift v. Tyson, with all its offspring, is mischievous in its consequences, baffling in its application, untenable in theory, and, as Mr. Charles Warren recently proved, a perversion of the purposes of the framers of the First Judiciary Act. It results in two independent lawmakers within the same state emitting conflicting rules concerning the same transactions. The fortuitous circumstances of residence of one of the parties at the time of suit determines what rule is to prevail in a particular litigation."

In the case of Erie R. Co. v. Tompkins, 304 U. S. 64, Mr. Justice Brandeis began his opinion—"The question for decision is whether the oft-challenged doctrine of Swift v. Tyson shall now be disapproved," and the rule of Swift v. Tyson was repudiated.

The petition for certiorari of Augusta M. Turner in this case rests solely on the representation that the decision of the Circuit Court of Appeals for the Seventh Circuit would re-establish the rule of Swift v. Tyson.

It is respectfully submitted that this is not so. As has been pointed out, petitioner apparently does not understand the law of trusts. She says it is the law of Illinois that a trust once perfectly created cannot be revoked unless the power of revocation is expressly reserved. This is true as far as the instrument or trust itself is concerned. But courts of equity, including those in Illinois, have uniformly held that an irrevocable trust may nevertheless be revoked by the agreement of the parties (Williams v. Evans, supra, etc.).

The decision of the Circuit Court complained of by the petitioner does not establish any presumptions whatever. It concurs with the decision of the District Court of the

United States for the Southern District of Illinois in a finding of fact, viz., that a trust was created by August Luer in 1930 and revoked by him in 1932 with the knowledge and consent of the petitioner, Augusta M. Turner, one of the beneficiaries of the trust.

If the findings of fact by the District Court, concurred in by the Circuit Court of Appeals for the Seventh Circuit, are correct, the petitioner has no cause of action. We submit that these findings are substantially supported by the record.

Where findings of fact are concurred in by both the District Court and the Circuit Court of Appeals this court will hesitate to disturb them.

IV.

Erie R. Co. v. Tompkins Suggests Grave Discrimination by Petitioner Against Respondents.

In that case, the Court said:

> "Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State. Swift v. Tyson introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right would be determined was conferred upon the non-citizen."

In footnote 9, in connection with the foregoing, the Court observed:

> "It was even possible for a non-resident plaintiff defeated on a point of law in the highest court of a State nevertheless to win out by taking a non-suit and renewing the controversy in the federal court (citing examples)."

Applying these suggestions to the record in this case, the position of the petitioner does not appear in a favorable light. The record discloses that this is the fifth tribunal in which this controversy, or some phase of it, has been aired.

1. The answer of the intervening-respondent, Alton Banking and Trust Company, alleges that prior to filing her action in the United States District Court, all of the trust property was inventoried as assets of the estate of August Luer in the Probate Court of Madison County, Illinois, and notice of the proceedings was given to the petitioner; that on the filing of a petition to sell the assets at public sale the petitioner appeared in said court, obtained several continuances; that she had knowledge and information that among the assets was the stock conveyed in the trust instrument; that notwithstanding such knowledge and information, she did not protest, but allowed the stock to be sold, and that she did not thereafter file any objection to the sale or the approval thereof by the said Probate Court of Madison County, Illinois (R. 41 through 44).

The District Court made a finding of fact substantially as above (R. 232) and the Circuit Court of Appeals concurred in such finding (R. 255).

2. The answer of the respondents herein alleges that the petitioner, prior to filing her action in the United States District Court, intervened in a certain cause of action in the Circuit Court of Madison County, Illinois, which was then pending, and in said cause of action the petitioner sought to have certain judgments in the said Circuit Court of Madison County, Illinois, vacated; that in support of her motion to vacate the said judgments, the petitioner attached her affidavit reciting in effect all the matters which are alleged and set forth in petitioner's complaint and amended complaint in this cause of action; that in the

proceedings in the said Circuit Court of Madison County, Illinois, her motion was denied and that she has not prosecuted any appeal from the order denying her motion (R. 14, 31 through 36).

The District Court made a finding of fact substantially as above (R. 232).

3. The District Court in his findings of fact did not hold that the activities of the petitioner in the state courts of Illinois prior to filing her suit in the federal court constituted an estoppel, but he undoubtedly did conclude that such activities were further evidence of the knowledge of the petitioner of the revocation of the trust and of her acquiescence therein.

Surely here, the suggestion in Erie R. Co. v. Tompkins comes to full flower—"the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen."

What better illustration of footnote 9 that—"It was even possible for a non-resident plaintiff defeated on a point of law in the highest court of a state nevertheless to win out by taking a non-suit and renewing the controversy in federal court," could be pictured than the case at bar. Except, of course, that the federal courts in this case have followed the rule in Erie R. Co. v. Tompkins, applied the local law, and the petitioner has not won out.

4. The decision of the Circuit Court of Appeals for the Seventh Circuit made only one statement of law in its decision:

> "The recital of the foregoing evidence is merely to show there was substantial evidence to support both findings, either of which necessitated a decree for the defendants.
>
> "The judgment is affirmed" (R. 256).

5. On the basis of the foregoing record this Court now is asked to grant a Writ of Certiorari to correct an alleged "unconstitutional assumption of powers by the federal courts of the United States" (Petitioner's Brief, p. 27).

CONCLUSION.

This is not a case where the doctrine or dicta of Erie R. Co. v. Tompkins sits comfortably on either side. It was difficult in pointing out the failure of the petitioner, for the respondents to resist the opportunity to suggest some pertinent application of the dicta in the Erie case to the case at bar. We apologize for having done so.

This is a case in equity and the issues, in one form or another, have been presented in the Probate and Circuit Courts of Madison County, Illinois, in the United States District Court for the Southern District of Illinois, and in the United States Circuit Court of Appeals for the Seventh Circuit.

The issues as presented by the pleadings and the evidence, in the final analysis, were entirely issues of fact. On these issues of fact both the District Court and the Circuit Court of Appeals have concurred.

Wherefore, the Writ of Certiorari should be denied.

Respectfully submitted,

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